(10)

No. 00-5961

IN THE

Supreme Court of the United States

MELVIN TYLER,

Petitioner,

vs.

BURL CAIN, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Does the rule of *Cage* v. *Louisiana* qualify for the "new rule" exception to the statutory bar on successive petitions, 28 U. S. C. § 2244(b)(2)(A), in the case of a petitioner whose first federal petition was filed in 1988? Specifically:

1. Has *Cage* been made retroactive to cases on collateral review by this Court?

2. If not, should it be in this case?

3. Was a *Cage* claim "previously unavailable" within the meaning of the statute?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

properly implemented, will greatly reduce unnecessary delay in the enforcement of the criminal law. These changes would advance the rights of victims and society which CJLF was formed to protect.

This case focuses on two particular aspects of habeas law of particular interest to CJLF: retroactivity and successive petitions. The statutory reforms at issue build on two landmark cases in which CJLF's participation was significant. See *Teague* v. *Lane*, 489 U. S. 288, 300 (1989); *McCleskey* v. *Zant*, 499 U. S. 467, 523, n. 10 (1991) (Marshall, J., dissenting). This case therefore has special interest to us.

SUMMARY OF FACTS AND CASE

On March 20, 1975, Melvin Tyler intentionally fired a gun through the window of an occupied dwelling, *i.e.*, his girlfriend's home, killing his own infant daughter. Brief for Petitioner 2-3. At his trial, the jury was given an instruction on reasonable doubt. To highlight the similarities and differences between this instruction and the one in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), we print it here in legislative amendment style. Words in the present case but not in *Cage* are in italics, and words in *Cage* but not in the present case are in strikeout type. The sources are *State* v. *Cage*, 554 So. 2d 39, 41 (La. 1989) and Brief for Petitioner 3-4:

> "If you entertain ~~a~~ *any* reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your *sworn* duty to give him the benefit of that doubt and return a verdict of ~~not guilty~~ *acquittal*. Even where the evidence demonstrates a probability of guilt, *yet* if it does not establish ~~such guilt~~ *it* beyond a reasonable doubt, you must acquit the accused. This doubt ~~, however,~~ must be a reasonable one; that is, one ~~that is~~ founded upon a real, tangible, substantial basis, and not upon mere caprice, *fancy or* ~~and~~ conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind*s* by reason~~s~~ of the unsatisfactory character of the evidence ~~or lack thereof~~.*; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt*. If, after giving a fair and impartial consideration *of* ~~to~~ all the facts in the case, you find the evidence unsatisfactory ~~or lacking of one~~ *upon* any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty. The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt. It ~~is~~ *should be* an actual *or* substantial doubt. It is *such* a doubt ~~that~~ *as* a reasonable man ~~can~~ *would* seriously entertain. *It is a serious doubt for which you could give good reason.* What is required is not an absolute or mathematical certainty, but a moral certainty."

Tyler filed five state post-conviction petitions. Brief for Petitioner 4. He filed a federal habeas corpus petition on November 8, 1988, which was denied. *Cage* was decided November 13, 1990. The Court of Appeals affirmed the denial of habeas relief in Tyler's case on November 21, 1990, *Tyler* v. *Whitley*, 920 F. 2d 929 (CA5 1990) (Table), and issued its mandate on January 2, 1991.

Five years after *Cage*, Tyler filed another state post-conviction petition, raising the instruction issue for the first time. It was denied in December 1996. Brief for Petitioner 4-5. He then sought and obtained leave to file a successive federal petition. J. A. 3. The district court found that the state court's decision on the merits was not contrary to clearly established federal law under 28 U. S. C. § 2254(d)(1). J. A. 12. The Fifth Circuit affirmed on the ground that *Cage* had not been made retroactive on collateral review by this Court. J. A. 15. This

Court granted Tyler's petition for writ of certiorari on December 11, 2000.

SUMMARY OF ARGUMENT

Under the AEDPA, a new claim in a successive petition is generally barred, but there is an exception for claims based on: (1) a new rule; (2) made retroactive by this Court; (3) which was previously unavailable. *Cage* v. *Louisiana* meets the first element, fails the second, and, in this case, fails the third. Applying the test of *Engle* v. *Isaac* and its progeny, the *Cage* claim was available when petitioner filed his first federal petition.

The statutory requirement that the particular rule has been made retroactive by this Court means what it says. Congress intentionally removed that authority from the lower federal courts. *Sullivan* v. *Louisiana* addressed a different issue and did not make *Cage* retroactive. A "grant, vacate, and remand" order does not set a precedent and does not make a rule retroactive. Rules which actually do apply retroactively on collateral review are extremely rare, and a requirement that this Court make the declaration is entirely practical and not a significant burden.

Retroactivity and harmless error are different doctrines with different, albeit related, purposes. Retroactivity focuses on how the law changes over time, so the magnitude of the change made by a new rule, relative to prior law, is important in determining whether it qualifies for the second *Teague* exception. *Cage* made only an incremental change to protections already in effect, and hence it is not a "watershed" rule. *Cage* is not retroactive under the second *Teague* exception.

ARGUMENT

I. *Cage* was a new rule, but not "previously unavailable."

Petitioner seeks to qualify for an exception to 28 U. S. C. § 2244(b)(2), the rule against raising new claims in a second habeas petition. The exception in subdivision (A), the "new rule" exception, has three elements: (1) "the claim relies on a new rule of constitutional law"; (2) that rule has been "made retroactive to cases on collateral review by the Supreme Court"; and (3) the claim "was previously unavailable . . . ."

Petitioner, whose first federal petition was litigated from 1988 to 1991, contends that *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), qualifies for this exception. The circuits have uniformly held that the first element is satisfied, *i.e.*, *Cage* is a "new rule," and the state does not dispute that element. In parts II and III, *infra*, we discuss why the second element is not satisfied. In this part, we explain why the third element is also missing.

The question of the third element of the statute is "fairly included" in the question presented, within the meaning of this Court's Rule 14.1(a). Congress has enacted a coherent exception to the abuse-of-the-writ bar, and the elements deal with the change in the law over time. The elements operate in conjunction to leave only a very small window. See *infra*, at 6. To address only the "new rule" and "retroactive" elements and ignore an obvious deficiency in the "previously unavailable" element would not be applying the statute Congress enacted; it would be applying a distorted version Congress did not enact. This issue "is a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.' " *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996).

Like many provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this section builds upon and strengthens habeas limits from preexisting case law. See *Slack* v. *McDaniel*, 529 U. S. 473, 486-487 (2000) (pre-AEDPA

law used to construe "second or successive" language of statute). *McCleskey* v. *Zant*, 499 U. S. 467, 470 (1991) addressed the standard for "a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey* adopted the "cause and prejudice" standard from the procedural default line of cases. See *id.*, at 493.

One type of "cause" asserted in default cases is that the defaulted argument was so novel at the time of prior proceedings that it was not available. See *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982) ("available"); *Reed* v. *Ross*, 468 U. S. 1, 16 (1984) ("not reasonably available"); *Smith* v. *Murray*, 477 U. S. 527, 537 (1986) ("whether at the time of the default the claim was 'available' at all"). The statute's phrase "previously unavailable" is an obvious reference to this line of cases. Cf. *Williams* v. *Taylor*, 529 U. S. 420, 433-434 (2000) (words "failed to develop" in § 2254(e)(2) echos case law, have the same meaning as in the case law). The window of this exception was small from the start, and the "new rule" doctrine of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), narrowed it to the eye of a needle. Any claim that is so "novel" as to be "unavailable" for *Engle*/*Reed* is necessarily "new" for *Teague*. See *Breard* v. *Greene*, 523 U. S. 371, 376-377 (1998) (*per curiam*); *Selvage* v. *Collins*, 975 F. 2d 131, 136 (CA5 1992); *Gacy* v. *Welborn*, 994 F. 2d 305, 310-311 (CA7 1993). Novelty as cause is now the path to habeas relief only if the claim qualifies for one of the two narrow *Teague* exceptions. The statute recognizes this with its twin requirements of retroactivity and previous unavailability.

Engle v. *Isaac*, *supra*, and *Reed* v. *Ross*, *supra*, bracket the novelty question. Both cases involved claims grounded in the requirement of proof beyond a reasonable doubt, as does the present case, and one found cause while the other did not.

The defendants in *Engle* v. *Isaac* were tried in three unrelated cases in 1975. See 456 U. S., at 112-115. All three cases involved self-defense, the juries were instructed that the defendants had the burden of proof, and none of the defendants

objected at trial. See *ibid.* The Court rejected the claim of novelty as cause. *In re Winship*, 397 U. S. 358 (1970) had "laid the basis" years before. See *Engle*, 456 U. S., at 131. Other defendants were making the claim, *id.*, at 131-132, and hence these defendants did not "lack[ ] the tools to construct their constitutional claim." *Id.*, at 133. A contrary precedent does not excuse a default on the ground of "futility." Courts do sometimes reconsider their precedents. See *id.*, at 130; *Bousley* v. *United States*, 523 U. S. 614, 623 (1998).

In *Reed* v. *Ross*, 468 U. S., at 3, the habeas petitioner sought the benefit of *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975) on the burden of proving malice. *Mullaney* was an application of the principle of *Winship*. See *Reed*, *supra*, at 3. The issue had not surfaced in the courts of the state until years after Ross's appeal. See *id.*, at 18. Only one federal appellate decision supported claims of this type, and that case was readily distinguishable. See *id.*, at 18-19. Most importantly for the present case, *Reed* distinguished *Engle* on the ground that Ross's default was pre-*Winship* rather than post-*Winship*, not on the ground it was pre-*Mullaney*. See *id.*, at 19. The case that establishes the general principle on which a claim is based provides the tools to construct it. Specific claims based on the general principle are not "novel" for *Engle*/*Reed*, although they are "new" for *Teague* until they are crystalized into a specific rule. Cf. *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (discussing level of generality). *Smith* v. *Murray*, 477 U. S., at 537, confirms that a claim is "available" if it has been "percolating." There is no requirement that it has actually been accepted by any court. See also *Bousley*, 523 U. S., at 622-623, and n. 2.

Applying these precedents to the present case is straightforward. First, we look at availability at the time of the "default." See *Engle*, 456 U. S., at 131. In successive petition cases, that is the time of the first federal petition. See *McCleskey*, 499 U. S., at 497. We need not consider whether the relevant time is the filing of that petition or its final disposition, see *In re*

Hill, 113 F. 3d 181, 183 (CA11 1997), because the answer is the same even giving petitioner the benefit of the earlier date.

Claims of the *Cage* type had not merely been "percolating" at the time Tyler filed his first federal petition. Two cases had been decided by the highest court of his own state, one of them accepting the claim. In *State* v. *Taylor*, 410 So. 2d 224, 225, n. 2 (La. 1982), the instruction was nearly identical to that in the present case. Although the court rejected the claim, it did note that the instruction had problems. See *id.*, at 225. Under the "percolating" standard of *Engle*, *Smith*, and *Bousley*, *Taylor* alone is sufficient to find that the claim was available in 1982, six years before Tyler's first federal petition.

State v. *McDaniel*, 410 So. 2d 754, 755 (La. 1982), decided a month later, involved a modified instruction. It said "great uncertainty" instead of "grave uncertainty" and "morally uncertain" instead of "not an abiding conviction to a moral certainty." The judge also added a statement about going outside the evidence. *Id.*, at 756. The court granted relief and noted that the error may be "of constitutional dimensions," citing *Winship*. *Ibid.*

Taylor and *McDaniel* can probably be reconciled given the difference in the instructions. Cf. *Victor* v. *Nebraska*, 511 U. S. 1, 21 (1994) ("abiding conviction" language "does much to alleviate any concerns"). Whether the cases are inconsistent, as petitioner claims, Brief for Petitioner 12, n. 3, or reconcilable does not matter, however. The important point is that claims of this type were being made and sometimes accepted. See also *Dunn* v. *Perrin*, 570 F. 2d 21, 23-24, and n. 1 (CA1 1978) (accepting constitutional challenge to somewhat similar instruction).

Tyler had more than sufficient tools to construct this claim in his first federal petition. He could easily have argued to the federal courts that *Taylor* was wrongly decided, and the Fifth Circuit did not finally dispose of his case until after *Cage*. Under the *Engle* rule, which Congress has now codified for

successive petitions, this claim is not cognizable on such a petition.

II. *Cage* has not yet been made retroactive on collateral review by this Court, although it could be in the present case.

A. The Statutory Requirement.

In 28 U. S. C. § 2244(b)(2)(A), Congress made an exception to the abuse-of-the-writ rule for new rules "made retroactive to cases on collateral review by the Supreme Court . . . ." Petitioner asks this Court, in essence, to rewrite this clause to say "made retroactive . . . by the district or circuit court in accordance with principles established by the Supreme Court." See Brief for Petitioner 9.

The plain meaning of "a new rule . . . made retroactive . . . by the Supreme Court" is to require action by this Court on the specific rule in question and specifically addressing retroactivity, rather than some other issue. Implicitly recognizing this, petitioner asks the Court to deviate from the plain meaning by quoting a disparaging remark about the draftsmanship of the statute. See Brief for Petitioner 14, n. 5 (quoting *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997)). This comment in *Lindh* dealt with an issue where the meaning was not plain. The difficulties which attended the drafting of this statute require, even more than normal, that the meaning be respected where it is plain.

Artistry in drafting, as in any endeavor, requires a single, coherent vision. The Mona Lisa was not painted by a committee. The statute at issue was "hammered out over the course of a great many negotiations." 141 Cong. Rec. 15,020, col. 1 (1995) (statement of Sen. Specter). Hammering leaves dents. Respect for the democratic process requires that the product of legislative compromise be left where the legislature put it and not moved somewhere else by tortured construction. In *West* v.

Vaughn, 204 F. 3d 53, 59 (2000), the Third Circuit sought to avoid the plain meaning of "made" by claiming that Congress could have used other words to make that meaning even plainer. This approach demands more of the legislative process than is realistic. While negotiating statutory language, once a point is settled and plainly expressed, negotiators move on to other points. They do not typically reopen an agreed point to alter subtle nuances of language. The Third Circuit's approach effectively demands perfection in drafting. Respect for the compromise actually reached by the democratic process requires a more realistic interpretation.

The habeas reforms of the AEDPA were the result of a profound dissatisfaction with the way habeas cases were being handled in the district courts and courts of appeals. Despite such landmark cases as *Teague* v. *Lane*, 489 U. S. 288 (1989) and *McCleskey* v. *Zant*, 499 U. S. 467 (1991), cases continued to drag on interminably. The problem was particularly acute in capital cases, where habeas corpus was effectively nullifying capital punishment. See 141 Cong. Rec. 15,037-15,038 (1995) (statement of Sen. Nickles).

The debacle surrounding the execution of Robert Alton Harris was repeatedly cited by supporters as illustrating the need for change. See, *e.g.*, 141 Cong. Rec. 15,013, col. 2 (1995) (statement of Sen. Specter); *id.*, at 4107-4108 (statement of Mr. Cunningham); *id.*, at 4111-4112 (statement of Mr. Cox). Harris's case became "final" on direct appeal in October, 1981. *Harris* v. *California*, 454 U. S. 882 (1981). State collateral proceedings and two overlapping federal petitions took another nine years. See *Harris* v. *Pulley*, 852 F. 2d 1546 (CA9 1988), opinion amended, 885 F. 2d 1354 (1989), cert. denied, 493 U. S. 1051 (1990). A *third* federal petition was denied, largely on *Teague* and *McCleskey* grounds, but that took another two years. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1528-1529 (CA9 1990), cert. denied, 503 U. S. 910 (1992). One would expect that the resolution of the *third* petition in a case with no serious question of guilt would be the end, but instead there followed

a series of evasions of the *McCleskey* limitation, see *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*), eventually culminating in an unusual, possibly unique, order from this Court prohibiting any more federal stays. *Vasquez* v. *Harris*, 503 U. S. 1000 (1992). The complete 141-step chronology is given in Lungren and Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 315-326 (1992). While the *Harris* case was unique in the shamelessness of the evasion of *McCleskey*, it was not unusual in the length of delay in the district and circuit courts. Supporters of stronger limits had horror stories from their own states. See, *e.g.*, 141 Cong. Rec. 4098-4101 (1995) (statement of Mr. Heineman); *id.*, at 15,062, col. 2 (statement of Sen. Hatch).

An interpretation of the statute to do nothing more than codify the case law is at war with its obvious and well-known purpose. Congress understood that reforms implemented by this Court were being frustrated by foot-dragging and evasion at lower levels and took steps to change that. At several points, the mechanism Congress chose was to elevate the decision to a higher level of the federal judiciary.

Some courts of appeals had held that their own precedents could be "old rules" for *Teague*,[2] but Congress limited 28 U. S. C. § 2254(d)(1) to "clearly established federal law, as determined by the Supreme Court." The initial decision to allow a successive petition to be considered was removed from the district court and placed in the hands of a three-judge panel of the Court of Appeals. See 28 U. S. C. § 2244(b)(3). The "new rule" exceptions refer to the Supreme Court, as discussed further below. See §§ 2244(b)(2)(A) and (d)(1)(C), 2254(e)(2)(A)(i), 2255, ¶ 6, subd. (3) and ¶ 8, subd. (2). These level-raising mechanisms indicate a lack of confidence in the

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2. *Amicus* believes that these cases were wrongly decided. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 948 (1998).

lower federal courts. Congress believed, with justification, that the *Teague* and *McCleskey* reforms were not being faithfully implemented, and moving the decisions to higher levels was one of its mechanisms for dealing with that problem. In particular, Congress limited the retroactivity exception for successive petitions to new rules made retroactive by this Court.

Comparison of the three retroactivity provisions applicable to state prisoners is instructive. (The federal counterparts in § 2255 are the same.) The three create parallel exceptions to three related doctrines: abuse of the writ, procedural default, and delayed petitions. The first two are identical: "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable . . . ." §§ 2244(b)(2)(A), 2254(e)(2)(A)(i) (emphasis added). The delayed petition language, *i.e.*, the new statute of limitations, is different: "if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . . ." § 2244(d)(1)(C).

Significantly, the latter language moves the "by the Supreme Court" requirement out of the retroactivity clause into the substantive clause. Petitioner contends that "by the Supreme Court" in the retroactivity clause of subdivision (b)(2)(A) means conformity to this Court's retroactivity jurisprudence, but the words would be superfluous if that were all they meant. Their absence from the corresponding clause of subdivision (d)(1)(C) does not authorize the courts of appeals to develop their own body of independent retroactivity law. They must still follow *Teague*. The difference in language means that, for the statute of limitations, state prisoners can file within one year of this Court's recognition of a new right, even if this Court has not resolved the status of the right's retroactivity on habeas corpus, as it typically would not if the new rule is made in a direct review case. It makes sense that Congress would be more generous with the statute of limitations, as that

relatively harsh rule cuts off prisoners who have never had a habeas petition, while the other two limits apply only to prisoners who did have a prior state or federal petition.

In *Lindh* v. *Murphy*, 521 U. S. 320, 326-329 (1997), this Court found significance in the AEDPA's use of different language in two different chapters of Title 28. Here we have different language in two subsections of the same section. The inference is much stronger here. Congress put the "by the Supreme Court" requirement in the retroactivity clause of one subsection and not the other because it intended different meanings.

Congress knew what it was doing, and the Seventh Circuit correctly recognized the meaning. "[R]etroactive application must be declared by the Supreme Court itself." *Talbott* v. *Indiana*, 226 F. 3d 866, 868 (2000). As discussed in part III A, *infra*, *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) decided a question distinct from retroactivity. That decision could not and did not make *Cage* retroactive.

B. Grant, Vacate, and Remand.

Petitioner contends that the Court's order in *Adams* v. *Evatt*, 511 U. S. 1001 (1994) makes *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), retroactive on habeas corpus. See Brief for Petitioner 28. The order was to grant certiorari, vacate the judgment, and remand, often referred to as a "GVR order." See *Lawrence* v. *Chater*, 516 U. S. 163, 166 (1996) (*per curiam*). This contention is completely without merit. A GVR order decides nothing. "It is precisely because of uncertainty that we GVR." *Id.*, at 172.

The typical GVR involves an intervening development in the law which creates a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Id.*, at 167. "Reasonable probability" is a modest threshold. It is less than preponderance. See *Kyles* v. *Whitley*, 514 U. S.

419, 434 (1995). Sometimes the intervening development is clearly controlling and the outcome on remand is nearly certain. See, *e.g.*, *Thomas* v. *American Home Products, Inc.*, 519 U. S. 913, 914 (1996) (Scalia, J., concurring) (federal court's interpretation of state law now clearly incorrect in light of subsequent state supreme court decision). Such certainty is not required, or even the norm. A GVR may follow a new agency interpretation of a statute, which is entitled to deference but not unquestioning acceptance. See *Lawrence*, 516 U. S., at 171. GVRs may also follow "plausible confessions of error *without determining their merits.*" *Ibid.* (emphasis added).

Particularly pertinent to this present issue, the Court may GVR a case for consideration in light of a new decision by this Court without deciding whether the new decision applies to the GVR'd case. A month after *Teague*, this Court GVR'd a capital case in which the Court of Appeals had applied a new rule, and the state had not raised retroactivity. *Zant* v. *Moore*, 489 U. S. 836 (1989) (*per curiam*); *id.*, at 836 (Brennan, J., concurring) (waiver issue should be considered on remand); *id.*, at 837 (Blackmun, J., dissenting) (defense should be deemed waived). Surely the GVR in *Zant* v. *Moore* did not decide whether *Teague* applied to the penalty phase of capital cases. That issue was reserved in *Teague* and decided at the end of the term in *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989). The issue of when nonretroactivity is waived was not decided until years later. See *Schiro* v. *Farley*, 510 U. S. 222, 228-229 (1994).

The Court has said often and emphatically that denial of certiorari is not precedent. See *Teague*, 489 U. S., at 296. A similar unequivocal statement is in order for GVRs. If GVRs were precedent, the Court would have to decide the merits before issuing them, cf. *ibid.*, and that would defeat their purpose. See *Lawrence*, 516 U. S., at 172-173. The GVR in *Adams* v. *Evatt* indicated that the issue was doubtful enough to require another look. That is all it meant. The retroactivity of *Cage* has not yet been decided by the Court.

C. Practical Considerations.

Petitioner invokes a parade of horribles to make a practical argument for evading the clear language of the statute. See Brief for Petitioner 17-22. The problems he sees, however, are either irrelevant or overstated.

Petitioner invokes the holding of *Bousley* v. *United States*, 523 U. S. 614, 621 (1998) that the *Teague* nonretroactivity bar does not apply to decisions on the substantive scope of federal criminal statutes. See Brief for Petitioner 17-18. This argument is irrelevant to the statute at issue. First, by its clear and unmistakable terms, 28 U. S. C. § 2244(b)(2)(A) applies only to "new rule[s] of *constitutional* law." (Emphasis added). Second, subdivision (b) only applies to state prisoners petitioning under § 2254, not to federal defendants, who must move under § 2255. *Bousley*-type claims may present a problem under the similar language of the last paragraph of § 2255, and this dilemma may arguably invoke the "inadequate or ineffective" reservation of the fifth paragraph, but that issue can and should await a case which actually presents it. See *United States* v. *Hayman*, 342 U. S. 205, 223 (1952).

Recognizing the weakness in this argument, petitioner drops a footnote discussing substantive constitutional bars to criminalizing certain conduct. Brief for Petitioner 18-19, n. 8. This is, of course, the first of the two *Teague* exceptions. See *Teague*, 489 U. S., at 311. This exception also encompasses categorical exemption of certain persons from certain punishments. See *Penry*, 492 U. S., at 330. A person sentenced to death for a murder committed at age 15 could invoke the rule of *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) retroactively on habeas corpus. As petitioner correctly notes, if anyone were actually in jail on a final judgment for flag-burning, that person could invoke *United States* v. *Eichmann*, 496 U. S. 310 (1990).

Petitioner protests that retroactivity of these rules is so obvious that decision of that question does "not meet the *ordinary* standards for the exercise of this Court's certiorari

jurisdiction," Brief for Petitioner 19 (emphasis added), and worries that the Court might allow obvious injustices to go unremedied. The answer lies in the rarity of these cases and the unlikelihood that many, if any, will arise in an "abuse of the writ" context. Thirty to forty years ago, new constitutional rights were being created at a rapid clip, but today they are not. Petitioner could only think of a single example for his brief, and we had to go back 13 years, before *Teague*, to find another. In both examples, the possibility that anyone would fail to raise the claim in the first petition seems quite remote, and the "new rule" exception does not apply to repetitive claims. See § 2244(b)(1). Rare times remote equals an extremely small number.

Division among the lower courts is not the only reason for this Court to take a case. Another reason is "an important question of federal law that has not been, but should be, settled by this Court . . . ." Supreme Court Rule 10(c). The execution of a 15-year-old or the imprisonment of a person for exercising a First Amendment right qualifies as an important question. As we discuss further, *infra*, at 18-20, there are avenues available for this Court to decide the question. The burden on the Court is quite minimal in light of the fact that these cases only arise on the order of once per decade, and then only following the Court's decision of the substantive question. "Ordinary standards" are beside the point, because qualifying cases are, by definition, extraordinary.

Cases where petitioners claim the second *Teague* exception are quite different from cases where they claim the first exception. As narrow as the first exception is, the second is "even more circumscribed." *O'Dell* v. *Netherland*, 521 U. S. 151, 157 (1997). While petitioner is correct that in first-exception cases retroactivity is obvious, qualification of post-1989 rules for the second exception is *never* obvious. Indeed, *amicus* believes that today it is nonexistent. This Court has never found a post-*Teague* rule to qualify, see *id.*, at 171 (Stevens, J., dissenting), and *Teague* itself expressed doubt on

the point. See 489 U. S., at 313. For the reasons discussed in part III, *infra*, *Cage* does not qualify.

Not only has this Court never found a post-*Teague* rule to qualify for the second exception, it has never mentioned as an example any rule newer than *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), decided 38 years ago. When Justice Stevens undertook to define "fundamental" rules, he did so by examples, and those cases were even older. See *Rose* v. *Lundy*, 455 U. S. 509, 544, nn. 9, 10, 11 (1982) (dissenting opinion) (citing *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Brown* v. *Mississippi*, 297 U. S. 278 (1936)); accord, *Teague*, 489 U. S., at 313-314. This is not a coincidence. The more fundamental a rule is, the earlier in judicial history it was recognized. See *Teague*, *supra*, at 313-314. Those rules which are so fundamental that they qualify for the extremely stringent criteria of *Teague* were all made before *Teague*. Even if we assume, for the sake of argument, that a tiny handful of fundamental rules escaped being made in the criminal procedure revolution of the 1960s and 1970s, the number is surely so small that formally declaring their status would only be a minimal burden to this Court. So far, the record is zero in twelve years. If the Court maintains its proper, extremely narrow interpretation of the exception, once per decade would be a generous estimate.

Petitioner cites as a counterexample this Court's denial of an original habeas writ in *In re Smith*, 526 U. S. 1157 (1999). He contends that this denial illustrates that the Court would not consider it worthwhile to address a retroactivity question in the absence of a circuit split. See Brief for Petitioner 21, n. 9. He reads too much into a summary denial. It appears quite likely that the Court's denial was based in large part on procedural hurdles that would have precluded reaching the *Cage* issue. Among other problems, Smith's petition was time-barred unless the tolling provision of 28 U. S. C. § 2244(d)(2) applies to prior federal petitions. See Brief for United States as *Amicus Curiae* in *In re Smith*, No. 98-5804, pp. 17-18. At the time, there was

no circuit authority on this tolling question, see *id.*, at 18, and that issue needed to "percolate." It is now before this Court in *Duncan* v. *Walker*, No. 00-121.

In the present case, the Fifth Circuit did authorize a successive petition, and this Court therefore has certiorari jurisdiction to review its subsequent decision denying the petition. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 657-658, 665 (1996) (motion for leave to file denied by Court of Appeals, no certiorari jurisdiction). Even though *Cage* has not yet been made retroactive by this Court, it could be in this case, if it really did meet the criteria for retroactivity. Reviewing courts generally apply the law as it exists at the time of review, and a lower court decision may be held in "error," or even "plain error," even though it was rendered in full accord with precedents in effect at the time. See *Johnson* v. *United States*, 520 U. S. 461, 467-468 (1997). Nothing in the language of the statute precludes this Court from making a rule retroactive in a successive petition case and reversing a court of appeals' decision, even if that decision was correct when rendered, *i.e.*, the rule had not then been made retroactive. However, if the present case establishes that the Fifth Circuit's interpretation of § 2244(b)(2)(A) is correct, then the courts of appeals will no longer grant leave to file for claims under rules not yet made retroactive by this Court, and this route will not be available in the future. This situation presents only minor practical problems.

Several other avenues are available for this Court to declare a rule retroactive on habeas corpus in the extremely rare event that such a declaration is necessary. One method is to make the rule on habeas corpus initially, as would have occurred in *Penry*, 492 U. S., at 330, if Penry had prevailed on the merits of his categorical exemption claim. Another route is to grant certiorari in a case where a habeas petitioner claims an exception in his first habeas petition. Petitioner complains that such a grant is unlikely when the courts of appeals are unanimous that a rule *is* retroactive. See Brief for Petitioner 20. This

situation with *Cage* was the unfortunate result of confusion between structural error and retroactivity. Before *Sullivan*, there were circuit decisions holding *Cage* not retroactive, see, *e.g.*, *Skelton* v. *Whitley*, 950 F. 2d 1037, 1045-1046 (CA5 1992), and the present case should clear up the confusion *Sullivan* generated. Between the extreme narrowness of the second *Teague* exception and the asymptotically decreasing "fundamentalness" of any rules remaining to be made, it is highly unlikely that any new rule will ever again be unanimously held retroactive under this exception. Even if that did happen, a rule that fundamental would *per se* be important enough for review under Supreme Court Rule 10(c). Summary affirmance remains available in the rare event that there is a special need to put this Court's imprimatur on a clearly correct decision of a lower court. See, *e.g.*, *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) (summarily affirming clearly correct state court decision). A summary affirmance is precedent for the essential elements of the judgment affirmed, see *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 203, n. 21 (1996), which would typically include retroactivity of a rule applied on habeas corpus.

The final method, available on successive petitions, is an original petition in this Court. The " 'gatekeeping' system" of 28 U. S. C. § 2244(b)(3) does not apply, *Felker*, 518 U. S., at 662, but the substantive limitations at least "inform," if not bind, this Court's consideration of the petition. *Id.*, at 662-663. Original petitions are not the optimum way for issues to reach this Court, but, again, the number of retroactive rules is so extremely small that they would present little burden in the total workload of the Court.[3] A habeas petitioner who really did have such a fundamental claim under a rule that is new at this

3. Justice Stevens' concurring opinion in *Felker* lists two other possibilities: the All Writs Act and review of interlocutory orders. See 518 U. S., at 666. We do not rely on these as their status remains uncertain.

point in history would qualify under Supreme Court Rule 20.4(a), having both exceptional circumstances and an inability to obtain relief from other courts. Cf. *Felker*, *supra*, at 665.

In summary, *Cage* has not been made retroactive on collateral review "by the Supreme Court," which requires an express holding to that effect. The question is open for resolution in the present case, and we now turn to that question.

III. *Cage* does not qualify for the second *Teague* exception.

A. Retroactivity v. Harmless Error.

Petitioner maintains, and a number of courts of appeals have held, that *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) compels the conclusion that the rule of *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), disapproved in part in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991), qualifies for the second exception to the nonretroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). Brief for Petitioner 24. This argument is a *non sequitur*. *Sullivan* addressed whether "*Cage* error" is susceptible to harmless-error analysis. 508 U. S., at 276. Retroactivity and harmless error are distinct questions and must be addressed separately.

Harmless error analysis and nonretroactivity both have the effect of denying relief to some defendants, despite an aspect of their trials that today would be recognized as constitutional error. The two doctrines therefore have some common aspects, and it is not surprising to see some similar language in the opinions. They also have significant differences, however. The classes of denied defendants are different, and the considerations that go into denying relief in a particular case are different.

A finding that a rule is not retroactive on collateral review cuts off relief from an entire class of defendants, *i.e.*, those whose convictions were final before the rule was made. There

is no individual consideration of whether observance of the rule would have made a difference in the particular case. The effect is temporary, however, as nonretroactivity has no effect on future cases. Harmless error is applied case by case, but it applies forever. *Arizona* v. *Fulminante*, 499 U. S. 279 (1991) applied harmless error analysis to a rule created half a century earlier in *Brown* v. *Mississippi*, 297 U. S. 278 (1936).

Nonretroactivity serves to limit the costs imposed by overturning final convictions based on new rules when those costs outweigh the benefits. See *Sawyer* v. *Smith*, 497 U. S. 227, 242-243 (1990). It is the nature of the judicial process that new rules can only be made in cases where they affect the outcome, see *Teague*, 489 U. S., at 315, and equal treatment demands that those similarly situated be treated the same. See *ibid.* However, the price of progress would be too great if every new rule required reexamination and possibly retrial of every case when the prior rule was applied. *Id.*, at 310. The focus is the *difference* in the law between two points in time. Is the cost of retrying cases, which were reasonably deemed properly tried under prior law, outweighed by the value of the additional protection of the new rule, *compared* to the protections available under prior law?

Harmless error has an altogether different basis. It seeks to achieve the just result in the individual case. While harmless error is also based on "social costs," see *Calderon* v. *Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*), the cost-benefit analysis assesses whether the likelihood that the error made a difference in the particular case outweighs the cost of retrial. See *O'Neal* v. *McAninch*, 513 U. S. 432, 443 (1995) (balancing interests and risks). The relevant comparison is between what actually happened and what should have happened. The timing and magnitude of changes in the law are irrelevant. Nonretroactivity on habeas and eligibility for harmless error analysis are both the general rules, and the respective classes of exceptions are both small. They are, however, different classes and small for different reasons.

The jury discrimination cases establish unequivocally that the two classes are not the same. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) rejected the state's argument that racial discrimination in the selection of the grand jury could be harmless error when followed by a conviction by a properly selected trial jury. The main reason is that this "grave constitutional trespass" would have no effective remedy without reversal of the subsequent conviction. See *id.*, at 262. There is no case-by-case assessment to make. The choice is reverse all such cases or reverse none.

Certainly it cannot be said that this error renders the final result unreliable. States do not have to use grand juries at all, *Hurtado* v. *California*, 110 U. S. 516, 538 (1884), or even preliminary hearings. See *Lem Woon* v. *Oregon*, 229 U. S. 586, 589 (1913). The only argument the *Hillery* Court could make for *any* effect on the outcome was the discretion of the grand jury not to indict despite proof of guilt. See 474 U. S., at 263. To say that such an exercise of discretion was highly unlikely in the case of the brutal murder of a 15-year-old girl, see *id.*, at 267 (Powell, J., dissenting), would be an understatement. The "unfairness" that precludes harmless error analysis in racial discrimination cases is not a lack of confidence in the result but rather the denial of equal treatment based on race, contrary to the very core of the Fourteenth Amendment. Statements in other cases regarding structural error and reliability, see, *e.g.*, *Neder* v. *United States*, 527 U. S. 1, 8-9 (1999), must be considered with *Hillery* in mind. Some rules qualify for this small group because of their powerful impact on reliability, but others qualify for other reasons. Another example is the right of self-representation, see *id.*, at 8, the exercise of which rarely improves the defendant's chances of acquittal. See *Martinez* v. *Court of Appeal*, 528 U. S. 152, 161 (2000); see also *Morris* v. *Mathews*, 475 U. S. 237, 244-245 (1986) (retrial for jeopardy-barred offense "not in any sense harmless," even though conviction reduced to non-barred offense); cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 396 (1994) (extension of Double

Jeopardy Clause to noncapital sentencing not within second *Teague* exception).

If structural errors were necessarily *Teague* exceptions, then all jury discrimination rules would be retroactive on habeas corpus. The definitive counterexample is *Teague* itself. Teague objected at trial to the prosecutor's use of peremptory challenges, allegedly in a racially discriminatory manner. *Teague*, 489 U. S., at 293. This claim would later be recognized in *Batson* v. *Kentucky*, 476 U. S. 79, 97-98 (1986), but was held nonretroactive on habeas in *Allen* v. *Hardy*, 478 U. S. 255 (1986) (*per curiam*). See *Teague*, *supra*, at 294. The *Teague* Court would not reconsider *Allen* v. *Hardy*, *id.*, at 296, and it held that creation of a rule equivalent to *Batson* under the Sixth Amendment instead of the Equal Protection Clause would be a nonretroactive new rule. *Id.*, at 299 (plurality opinion). The dissent asserted *Hillery* for the proposition that Teague's proposed rule qualified for the second exception based on its "far graver impact on the fundamental fairness of a petitioner's trial than the discrimination we condemned in *Hillery* . . . ." *Id.*, at 344 (opinion of Brennan, J.). The *Hillery* argument is implicitly rejected by the plurality, which held that the error in question "does not undermine the fundamental fairness that must underlie a conviction." *Id.*, at 315; see *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (argument made in dissent deemed implicitly rejected by majority).

Conversely, coerced confessions are not structural error, see *Arizona* v. *Fulminante*, 499 U. S., at 310, even though the rule against them is fundamental for *Teague* purposes. See *Teague*, 489 U. S., at 313. To be sure, a few rules are both structural error and *Teague* exceptions by reason of their powerful *and* unassessable impact on the reliability of the outcome. The paradigm is, of course, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). See *Neder*, 527 U. S., at 8 (structural error); *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (*Teague* exception). The set of rules that qualify for the *Teague* exception and the set that are "structural error" are intersecting sets, neither being a subset

of the other. Hence, membership in one does not determine membership in the other. The fact that "*Cage* error" is "structural" does not tell us whether *Cage* is retroactive on habeas.

B. Cage and the Second Exception.

Most rules of criminal procedure enhance the accuracy of the proceeding. That is usually why they are made in the first place.[4] The fact that a rule has this effect is not enough to make it retroactive on habeas corpus. The exception is reserved for "watershed rules of fundamental fairness." *Sawyer*, 497 U. S., at 242. The rule must be "*essential* to the accuracy and fairness of the criminal process," *id.*, at 243 (emphasis added), rather than merely enhancing accuracy. Cf. *id.*, at 242.

"Watershed" means, in its figurative sense, a "critical point that marks a division or a change of course; a turning point . . . ." American Heritage Dictionary 2019 (3d ed. 1992). Rules that enhance or add an additional layer of protection to existing rules do not qualify. The rule in question must *be* the bedrock rule, with "the primacy and centrality of the rule adopted in *Gideon* . . . ." *Saffle*, 494 U. S., at 495.

Sawyer, *supra*, has the most detailed discussion of the exception to date, and the case illustrates the incremental versus watershed distinction. *Sawyer* involved the retroactivity of the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) regarding prosecutor arguments which diminish the jury's sense of responsibility. See *Sawyer*, 497 U. S., at 232. Before *Caldwell*, "the rule of *Donnelly* [v. *De Christoforo*, 416 U. S. 637 (1974)] was in place to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair." *Id.*, at 243. *Caldwell* provided "an additional

4. The principal contra-accuracy rule has been virtually banned from habeas corpus. See *Stone* v. *Powell*, 428 U. S. 465, 490-491 (1976).

measure of protection." *Id.*, at 244. This incremental protection had value, but it did not qualify for the exception. *Ibid.*

Stovall v. *Denno*, 388 U. S. 293 (1967) provides another illuminating example, even though it comes from the pre-*Teague* era. Since *Teague* was a sharp curtailment of habeas retroactivity, see *Teague*, 489 U. S., at 327 (Brennan, J., dissenting), it follows that rules that were not retroactive under the prior body of law would not qualify for the second *Teague* exception. *Stovall* addressed the retroactivity of new rules regarding the right to counsel at pretrial identifications. See 388 U. S., at 294; *United States* v. *Wade*, 388 U. S. 218, 226-227 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967). Even though the *Wade* and *Gilbert* rules were "justified by the need to assure the integrity and reliability of our system of justice," *Stovall*, *supra*, at 299, they were not retroactive, for two reasons. First, although injustices were possible in cases not conforming to these rules, the number of cases where no unfairness or injustice resulted was also large, much more so than in cases where counsel was denied on trial or appeal. See *ibid.* Second, a defendant whose pretrial confrontation was truly unfair could fall back on pre-*Wade* due process requirements.

The base right to counsel is, as noted *supra*, the paradigm of a rule qualifying for the second *Teague* exception. Yet an extension of that rule to the critical stage of a pretrial identification was not retroactive. *Gideon* was a watershed rule. *Wade*'s enhancement of *Gideon* was not.

The watershed rule involved in the present case is *In re Winship*, 397 U. S. 358 (1970). *Winship* elevated to "constitutional stature" the requirement of proof beyond a reasonable doubt in criminal cases. *Id.*, at 364. That rule had been universally followed in adult criminal cases before *Winship*, see *id.*, at 361, but *Winship* made it a federal constitutional right.

In 1978, before the decision of petitioner's direct appeal, *Taylor* v. *Kentucky*, 436 U. S. 478 (1978) established that some

level of constitutional protection existed for jury instructions in this area. The actual holding of *Taylor* involved the presumption of innocence, *id.*, at 490, but the truncated, unclear, and confusing reasonable doubt instruction was a factor in the decision. See *id.*, at 488; see also *id.*, at 486, n. 13 (relation of presumption of innocence to proof beyond a reasonable doubt).

On this foundation, *Cage* v. *Louisiana*, 498 U. S. 39 (1990) (*per curiam*), decided that the instruction used in that case was "contrary to the reasonable doubt requirement articulated in *Winship*." *Id.*, at 41; see also *id.*, at 41, n. * (citing, *inter alia*, *Taylor*). While this holding was not dictated by precedent, and hence "new," it was hardly a "watershed rule." The basic right had been established. Instructions were already subject to scrutiny under this requirement. *Cage* was a fairly routine case about whether a general principle should be extended to invalidate a particular practice. It was a question of law and not a "mixed question," making *Teague* analysis of *Cage* like *Butler* v. *McKellar*, 494 U. S. 407, 414-415 (1990), and unlike *Wright* v. *West*, 505 U. S. 277, 306 (1992) (Kennedy, J., concurring in the judgment), but there is no "watershed" quality about it.

Before *Cage*, all defendants were entitled to instructions on the presumption of innocence and the standard of proof beyond a reasonable doubt. After *Cage*, it was established that the particular instruction in Cage's case was not sufficient. Four years later, it was established that another instruction with only a few differences *did* meet constitutional minimums. See *Victor* v. *Nebraska*, 511 U. S. 1, 19-22 (1994). Under the analysis of *Sawyer*, the question is whether the incremental change that *Cage* made was of the fundamental character needed to override the usual rule of nonretroactivity. The answer, *amicus* submits, is clearly no. This is fine-tuning.

This brings us back to *Sullivan* v. *Louisiana*, *supra*. The fact that *Sullivan* held that *Cage* error was not susceptible to harmless error analysis does not, by itself, require the conclusion that it also qualifies for the second *Teague* exception. Its

discussion of *Cage* does shed some light, though. The reasons for *Sullivan*'s holding do not apply to retroactivity.

Sullivan begins and ends its analysis by citing *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) for the importance of having the jury rather than judges make the finding of guilt. *Sullivan*, 508 U. S., at 277, 281. Yet *Duncan* was not retroactive. "The values implemented by the right to jury trial would not reasonably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *De Stefano* v. *Woods*, 392 U. S. 631, 634 (1968) (*per curiam*). Having the judge rather than the jury decide is not inherently unfair in the sense of creating a danger of wholesale convictions of innocent persons, see *id.*, at 633-634, but rather is inconsistent with " 'a profound judgment about the way in which law should be enforced and justice administered.' " *Sullivan*, *supra*, at 281 (quoting *Duncan*).

Rose v. *Clark*, 478 U. S. 570, 577 (1986) described some structural errors as those without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . ." *Sullivan* quoted this description. See 508 U. S., at 281. But this passage of *Rose* does not deal with jury trial. That issue is addressed in the next paragraph. There, *Rose* says that jury trial is structural because, regardless of how reliable the result may be, "the error in such a case is that the wrong entity judged the defendant guilty." 478 U. S., at 578. *Sullivan* also quotes and relies on this statement. 508 U. S., at 281. See also *Neder*, 527 U. S., at 38 (Scalia, J., dissenting) (*Sullivan* based on allocation, not accuracy, of decision).

Sullivan follows the same line as *Vasquez* v. *Hillery* and the rule that denial of self-representation cannot be harmless. See *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984). No matter how strong our confidence in the accuracy of the trial's result may be, the error is not harmless because the rule in question has a purpose independent of insuring accuracy. For appellate judges to make their own finding about the evidence in the individual case under harmless error analysis would

compound rather than cure the error. See *Sullivan*, *supra*, at 280.

Conspicuous by its absence from *Sullivan* is any discussion of how or how much *Cage* changed the law from what it had been before *Cage*. Such an inquiry is central to retroactivity and irrelevant to harmless error. Indeed, the only discussion in *Sullivan* of the specific rule in *Cage*, as opposed to the general reasonable doubt and jury trial requirements, is in the footnote. See 508 U. S., at 278, n. *. That footnote reserves the question of whether *Cage* is even *correct* after *Boyde* v. *California*, 494 U. S. 370, 380 (1990) and *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991). It would be more than a little strange to say that a case establishes an "absolute prerequisite to fundamental fairness," see *Teague*, 489 U. S., at 314, but then again it might be wrong.

Tyler, Cage, Victor, and Sandoval were all convicted by juries who were instructed that they had to find guilt proven beyond a reasonable doubt. See *Victor*, 511 U. S., at 7 (Sandoval, California instruction); *id.*, at 18 (Victor, Nebraska instruction). All four therefore received the protection of the bedrock procedural element established in *Winship*. In *Cage*, the actual implementation of that element fell a little short of the line. In *Victor* the implementation cleared the line. See *id.*, at 21-22. The instruction in the present case lies in between. It contains the "abiding conviction" language that *Victor* found helpful, but not the other clarifying elements of the Nebraska instruction. Compare *id.*, at 21, with *supra*, at 2-3. These line-drawing exercises on the ragged edges of constitutional doctrine are important and need to be done, but they have "none of the primacy and centrality of . . . *Gideon*." See *supra*, at 24. What is the probability that an innocent person was convicted because his jury got the *Cage* instruction, but the jury would have acquitted him if they had received the *Victor* instruction instead? *Amicus* submits it is small.

Cage v. *Louisiana* prompted an improvement in criminal justice, forcing courts and legislatures to revise and improve

instructions long in need of revision. That is a highly desirable result. The cost of progress, however, need not include retrial of every case tried under instructions which were considered entirely proper for many years. That cost is only justified for rules such as *Gideon*, where the improvement of a single step is so large and dramatic that substantial numbers of innocent people may be left in prison if full retroactivity is not extended to them. The rule of *Cage* v. *Louisiana* is not such a rule.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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